72-335 FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1972

No. 72-335

WALKER BECK LeFLORE,
Petitioner,

vs.

STATE OF ALABAMA, EX REL. CASSIE BELLE MOORE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

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OCTOBER Term, 1972

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WALKER BECK LeFLORE,

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CASSIE BELLE MOORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF ALABAMA

1

Petitioner herein respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Alabama, entered on April 6, 1972, which affirmed a judgment entered on January 27, 1971, in the Circuit Court of Mobile County, Alabama against petitioner, in a suit seeking to establish the paternity of the twin daughters of CASSIE BELLE MOORE.

OPINIONS BELOW

The Opinion of the Alabama Supreme Court in Le Flore v. State of Alabama, Ex Rel, Cassie Belle Moore is reported at ..... Ala. ...., ... So. 2d. ...., and is set forth in Appendix B, infra, pp, 14-22. The Order of the Circuit Court of Mobile County, Alabama is also printed in Appendix B, infra p. 13.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on April 6, 1972. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1257 (3), petitioners having alleged below, and alleged herein the denial of due process, deprivation of rights, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the right of petitioner to Constitutional due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States was abriged or denied, by the affirmance of the Alabama Supreme Court of a state court decree, which dismissed petitioner's appeal, purportedly on the theory that petitioner's appeal to the Circuit Court of Mobile County from the judgment of the Juvenile Court was not timely, when in fact the irregularity was the fault of court officials who were obviously responsible for the confusion created?

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section I, of the Fourteenth A-

mendment to the United States Constitution which is set forth in appendix A, p. 10.

STATEMENT

On August 21, 1969, a petition to establish paternity was filed in the Juvenile Court of Mobile County, Alabama, which charged the petitioner, Walker Beck LeFlore, a black physician of Mobile, Alabama, with being the father of twins born to Cassie Belle Moore on July 29, 1968. After a summary hearing before the Juvenile Court, an order was entered on July 14, 1970, which reflected an oral ruling from the bench on June 30, 1970, in which the Court held petitioner to be father of the two children in question.

An appeal bond, which was approved by the Juvenile Court on July 1, 1970 was duly filed, as is reflected in the Court's file. A notice of appeal was filed in the Juvenile Court of Mobile County, Alabama, however the filing date does not appear on the notice as filed. Likewise, a notice of appeal to the Mobile Circuit Court was duly filed. The date of filing does not appear on the Notice of Appeal, as filed in the Circuit Court.

The Juvenile Court's file was delivered to the clerk of the Circuit Court, in Equity, Domestic Relations Division with a certificate dated July 7, 1970. A motion to dismiss the appeal to the Circuit Court of Mobile County, Alabama for untimeliness was granted on January 27, 1971, and the case was remanded to the Juvenile Court for enforcement of its judgment with cost to the petitioner.

The respondent claimed that both notices of appeal were filed in the Juvenile Court, and not as required by the Code of Alabama, 1940, Section 12(6), Title 27 as amended. However, no evidence was offered in support of the claim by Respondent.

From the remand order issued by the Circuit Court of Mobile County, Alabama, Petitioner appealed to the Alabama Court of Civil Appeals, which referred the case to the Supreme Court of Alabama, having noted that its jurisdiction was "doubtful."

After oral argument, the Alabama Supreme Court on April 6, 1972, granted a peremptory writ of mandamus requiring petitioner, LeFlore, to make support payments althought no final judicial determination was made that LeFlore was the father of the children in question. Likewise, in a separate opinion the Alabama Supreme Court affirmed the order of the Circuit Court dismissing the appeal on the ground that the appeal was not timely taken.

REASONS FOR GRANTING THE WRIT

The Affirmance of the dismissal by the Alabama Supreme Court is inconsistent with the facts and sworn statements of petitioner's trial attorney, as well as affidavits in the record. See appendix A, Infra p. 116. The judge of the Circuit Court below stated that just about every appeal from the Juvenile Court of Mobile County on a paternity action resulted in confusion and for months and months nobody knew where they went.

The irregularity arose because court officials neglected to properly stamp said notices of appeal and process them by placing them in their respective files. As a result thereof petitioner was denied his right to appeal from an adverse judgment rendered in the Juvenile Court of Mobile Alabama. Commencing with **Hurtado v. California,** 110 U.S. 516, 4 S. Ct.11, this Court stated regarding state action that the right of property cannot be taken away without due process, and one's trial must be had according to the settled course of judicial proceedings. Petitioner's rights to procedural process of law as protected by the Fourteenth Amendment to the United

States Constitution were denied in the state courts of Alabama.

Mr. Chief Justice Warren writing for the Court **In Napue v. Illinois**, 360 U.S. 264, 79 S. Ct. 1173, stated "... that the duty rests on this Court to decide for itself facts or construction upon which federal constitutional issues rests." This court further stated in the **Napue** case that it is "The duty of this Court to make its own independent examination of the record when Federal Constitution deprivation are alleged is clear, resting as it does on our solomn responsibility for maintaining the Constitution inviolate."

As stated in **Yick Wo V. Hopins,** 118 U.S. 356 (1886):

> "Thought the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal descrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Construction ..."

As indicated the record clearly reveals that the notices of appeal were properly filed in both the Circuit Court and the Juvenile Court of Mobile County, Alabama but were not properly processed or stamped by local court officials. The trial record reveals this inept procedural irregularity which prompted comment and general criticism by the same judge who thereafter dismissed petitioner's appeal. In a case where a petitioner is entitled to his rights and privileges being protected, Mr. Justice Holmes writing for the Court in **Rogers v. Alabama,** 192 U.S. 226, 24 S. Ct. 259, stated as follows:

"The law of the United States cannot be evaded by the forms of local practice."

Admittedly the United States Supreme Court generally follows the construction, even impliedly adopted by the Supreme Court of Alabama, or any other state supreme court as to local practice and the interpretation of state statutes, however, the **Rogers** case expressly stated that:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect Constitutional rights **cannot be declined** (emphasis added) when it is plain that the fair results of a decision is to deny the right."

The rudimentary demands of justice, which were Petitioner's rights to due process, were denied in the state courts of Alabama by the playing of a cat and mouse game, initiated by the circuit court of Mobile and countenanced and approved by the Alabama Supreme Court in its final decision of the case at bar. A reading of the opinion reveals the strained effort of the Court to castrate petitioner's right to equal protection and due process. **Mooney v. Holohan,** 294 U.S. 103, 55 S. Ct. 103, which states in a per Curiam opinion that the Fourteenth Amendment ". . . governs any action of a state, whether through its legislature, through its Courts or through its executive or administrative officers."

Petitioner's right to appeal was denied by the Alabama Supreme Court when it opined the "an appeal is not a matter of vested right, but by grace of statute." See Appendix B, Infra, p. 18.

Illustrative of the strained effort to sustain the ruling below, which victimized the petitioner for nonfeasance by Mobile court officials, the Alabama Supreme Court further stated as follows in its opinion:

> "As before stated, neither of the notices of appeal are dated, and neither is marked filed. Each **apparently** (emphasis added) was in the

> Juvenile Court file, which was not received by the Circuit Court until 16 July 1970, more than ten days after the rendition of the judgment in the Juvenile Court. (Appendix B, Infra, p. 18.)

A formal peremptory writ of mandamus issued on the same day that its opinion was released in the case at bar stated that ". . . the children here involved are in dire circumstances and that LeFlore is a medical doctor and financially able to provide for their support."

Admittedly, trial counsel, did not formally raise any federal or constitutional issues in the appeal to the Alabama Supreme Court in view of the posture of the proceedings, nevertheless, this Petition for Writ of Certiorari does present a serious and substantial issue involving a subtle denial of procedural due process of law and equal protection of the laws by the Alabama Supreme Court in violation of the Fourteenth Amendment to the Constitution of the United States.

Fundamentally, the effect of the present affirmance by the Alabama Supreme Court should not be allowed to thwart review of the present petition, since petitioner has complied with procedural rules, not only in form, but also in substance. By a simple recitation in its opinion that petitioner had failed to file a notice of appeal timely to the Mobile Circuit Court, that the Alabama Supreme Court because of such alleged defect was prevented from disturbing the decision below. This practice of the Alabama Supreme Court is apparently now well known by this Court. In **N. A. A. C. P. v. Alabama,** 377 U.S. 296, 84 S. Ct. 1302, 1308, this Court Stated:

> "The consideration of asserted constitutional rights may not be thwarted by a simple recitation that there has not been observance of a procedural rule with which there has been

> compliance in both substance and form in every real sense."

In **Davis v. Wechsler,** 263 U. S. 22, 44 S. Ct. 13, (1923) this Court held that:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or bar the assertion of it even upon local grounds."

Whether a state court by putting forward non-federal grounds of decision which are without fair or substantial support, so as to preclude rights under the federal constitution has also been considered by this Court and was answered in **Staub v. City of Boxley,** 355 U.S. 313, 78 S. Ct. 277 (1958).

In **Barr v. Columbia,** 378 U.S. 146, 149, 84 S Ct 1734, 1736 this Court stated:

> "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review. See e.g. **N.A.A.C.P. v. Alabama ex rel. Flowers,** 377 U. S. 288, 84 S. Ct. 1302; **Shuttlesworth v. Birmingham,** 376 U.S. 339, 84 S. Ct. 795, 11 L.Ed. 2d 766; **Wright v. Georgia** 373 U.S. 284, 83 S. Ct. 1240, 10 L.Ed. 2d 349; **N. A. A. C. P. v. Alabama ex rel Patterson,** 357 U. S. 449, 78 S. Ct. 1163. L. Ed. 2d 1499."

Unconstitutional decisions of state courts should be restained, **Central Land Co. v. Laidley,** 159 U.S. 103, 16 S. Ct. 80, and wrong judgment corrected. **Herb v. Pitcairn,** 324 U.S. 117, 65 S. Ct. 459.

Finally, the severity of the decision by the Ala-

bama Supreme Court becomes suspect, particularly when it strains logic and reason to sustain a judgment which frustrates the exercise of a citizen's fundamental right or privilege.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Charles S. Conley
Executive House
315 South Bainbridge Street
Montgomery, Alabama 36104

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing petition have been served on J. Terry Reynolds, Jr. Esq., attorney for the respondent, at 1401 E. A. Roberts Bldg., Mobile, Alabama 36602, via United States mail, postage prepaid this 24th day of August, 1972.

of Counsel

APPENDIX A

1. Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the juridiction thereof, are citizens of the United States of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

CODE OF ALABAMA, 1940 Title 27

§ 12 (6). **Appeal to to Circuit Court.** The State of Alabama or the reputed father may appeal from any final judgment rendered under section 12 (4) of this title by the Court in which the proceeding originated within ten days after rendition thereof by filing written notice of such appeal within said prescribed period with the clerk of the Circuit Court to which said appeal is taken and in the Court rendering the judgment. On such appeal the trial shall be de novo. The State or the reputed father shall have the right to demand a trial by jury for said trial de novo by filing a written demand therefor with the clerk of the Circuit Court within ten days after the appeal is taken, but the only question of fact for the decision of the jury shall be the paternity of the child. All other questions of fact in the trial de novo shall be decided by the Court without the intervention of a jury. (1961, Ex. Sess., p. 2355, § 6, appvd. Sept. 15, 1961.)

§ 12 (7). Appeal from Circuit Court to Supreme Court or Court of Appeals; security for costs. Either party may appeal to the Supreme Court or Court of Appeals within thirty days after rendition of final judgment in the Circuit Court on the trial de novo. If the appeal is taken by the State, no security for the cost of the appeal need be given; if the appeal is taken b ythe reputed father, he must give security for the cost of the appeal, to be approved by the clerk of the Circuit Court who shall certify the names of sureties, together with the record, to the appelate (appellate) Court, and execution may issue for the cost of the appeal against them from such Court, it the judgment of the Circuit Court is affirmed. If the reputed father makes affidavit filed with the clerk of the Circuit Court that he is unable, after diligent effort, to make the appeal bond, he may appeal without any bond. (1961). Ex. Sess., p. 2355, § 7, appvd. Sept. 15, 1961.)

II AFFIDAVITS

A. Affidavit of Dottie M. Crane

STATE OF ALABAMA
COUNTY OF MOBILE

I, Dottie M. Crane, after being first duly sworn, deposes and says as follows:

I am employed as the sceretary of Thomas M. Haas, Attorney at Law. I have been employed by Mr. Haas approximately 7 years.

On July 2, 1970, Mr. Haas dictated a notice of appeal in the case of, Cassie Bell Moore vs Walker B. LeFlore, Sr., to be filed in the Juvenile Court of Mobile County, Alabama, and dictated a notice of appeal from the Juvenile Court to be filed in the Circuit Court of Mobile County, Alabama, also demanding a trial by jury.

After I completed typing the notices of appeals, I ask the receptionist in our office, Miss Donnah Berry, to take the two notices of appeals to the Courthouse and told her to file one with the Juvenile Court and one in the Circuit Court. When she returned to the office she told me that she filed them in the appropriate places.

/s/Dottie M. Crane
Dottie M. Crane

Subscribed and sworn to before me on this 2nd day of September, 1970.

/s/Lana Lum Cruise
NOTARY PUBBLIC
Filed in Open Court, November 10, 1970

B. Affidavit of Donnah Berry

STATE OF ALABAMA
COUNTY OF MOBILE

I, Donnah Berry, after being first duly sworn, deposes and says as follows:

On July 2, 1970, upon instructions from Mr. Hass' secretary, I filed in the appropriate places in the Mobile County Courthouse, Notices of Appeal in the case of: Cassie Bell Moore vs Walker B. LeFlore, Sr.

/s/Donnah Berry
Donnah Berry

Subscribed and sworn to before me on this 2nd day of September, 1970.

/s/Lana Lum Cruse
NOTARY PUBLIC
Filed in Open Court, November 10, 1970

APPENDIX B

I. ORDER OF THE CIRCUIT OF MOBILE COUNTY, ALABAMA

THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Equity Division

Case No. 77,607

WALKER BECK LeFLORE,
Appellant,

v.

STATE OF ALABAMA, EX REL.,
CASSIE BELLE MOORE,
Appellee.

ORDER DENYING AND DISMISSING APPEAL; REMANDING CAUSE TO JUVENILE COURT; and TAXING COSTS

This cause having been sumitted for decree on the pleadings and testimony on an appeal from the Juvenile Court, Mobile County, Alabama, and it appears to the Court from the testimony and evidence as presented de novo that said appeal was not properly or timely filed in this cause, and that said appeal should be dismissed, and upon consideration, it is ORDERED, ADJUDGED AND DECREED b ythe Court that the appeal from the Juvenile Court, Mobile, County, Alabama, be and hereby is, denied and dismissed, and that said cause

be id hereby is, now remanded to the Juvenile Court, Mole County, Alabama, for enforcement of its' judgmer heretofore rendered.

: is also further ORDERED, ADJUDGED and DECRED by the Court that all costs incurred herein be, and ne same hereby are taxed against the appellant, Walr Beck LeFlore, and the sureties on his bond, for whic let excution issue.

Date January 27th, 1971.

/s/Ferrill D. McRae
JUDGE

II. OPINION OF THE ALABAMA SUPREME COURT

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1971-72

Walker Beck LeFlore
v.
State of Alabama, ex rel.
Cassie Belle Moore

1 Div 714

ppeal form Mobile Circuit Court, In Equity
HARWOOD, JUSTICE

Proceedings were instituted in August 1969 in the Juvele Court of Mobile County to establish the paternity of the twin daughters of Cassie Belle Moore. The suit vs brought by the State of Alabama on the relation of th mother. The defendant and reputed father was Dr. Walker Beck LeFlore.

After considerable legal maneuvering, continuances,

and partial hearings, the proceedings were completed in a hearing on 30 June 1970.

On that day the following order, judgment and decree was rendered and placed on the records of the Juvenile Court:

> "6/30 Com. and Def. appearing with their attorney and additional testimony being received, at the conclusion of which both Comp. and Def. rested, from the evidence presented the Court finds the Def. to be the father of the children Colette and Claudia Moore. Def. gives notice of appeal and the Court sets appeal bond at $100 and declines to fix a specific amount of support pending the hearing of the appeal at which time, if affirmed, the Court will fix support payments unless this is done by Appeal Court."

The entire court file of the proceedings in the Juvenile Court was thereafter delivered to the Circuit Court of Mobile County, in Equity, with a certificate dated 7 July 1970. Despite the date of the certificate it was conceded by defendant's counsel that this file was not delivered to the Circuit Court until 16 July 1970. This certificate was executed by Norman J. Gale, Supervisor, Chief Investigator Non-Support Division, Juvenile Court, Mobile, Alabama. Among other things the certificate sets forth that at the hearing on 30 June 1970, the Juvenile Court had found and adjudicated LeFlore to be the father of Cassie Belle Moore's two illegimate children, and that the defendant, through his attorney immediately gave notice of appeal, and that the court "at the rendition of its decision declined to fix a specific amount of support pending appeal."

Contained in what is designed as "Original Court File of Juvenile Court," which was the file delivered to the Circuit Court on 16 July 1970, are two undated notices

of appeal. One is entitled "Notice of Appeal from the Juvenile Court," and is headed "In the Circuit Court of Mobile County, Alabama." and "gives notice that the defendant "appeals to this Honorable Court from the **Judgment of the Juvenile Court** on June 30, 1970, and all prior adverse rulings of said court." The second Notice of Appeal headed "In the Juvenile Court of Mobile County, Alabama," recites that the defendant "gives written notice of appeal to the Circuit Court of Mobile County from the **decision of this court on June 30, 1970.** The defendant also appeals all prior adverse rulings of this Court." (Emphasis ours.)

Each of the above notices demands a jury trial in the Circuit Court.

Neither of these appeal notices is marked "filed."

There also appears in the Juvenile Court an Appeal Bond which contains the following recital:

> "We, Walker Beck DeFlore principal, and Mobile Bonding Company and its agents as sureties acknowledge ourselves indebted to Mobile County, Alabama, in the sum of one-hundred DOLLARS for the payment of which, well and truly to be made, we bind ourselves, our Administrators and executors. But the condition of the above obligation is such, **that whereas the Juvenile Court of Said County did on the 30th day of June, 1970, make and enter a final order of judgment,** whereby the above bounden Walker Beck LeFlore was adjudicated the father of two (Twins) illegitimate children ***" (Emphasis ours.)

This bond is dated 6 July 1970, and was approved by the Judge of the Juvenile Court on 7 July 1970.

On 21 August 1970, the state, on the relation of

Cassie Belle Moore, complainant, filed a motion in the Circuit Court, in Equity, to dismiss the appeal taken to the court from the judgment of the Juvenile Court on grounds that the appeal was not timely filed.

An extensive hearing on the motion was held by the Hon. Ferrill D. McRae, Judge of the Circuit Court of Mobile County,in Equity, and thereafter Judge McRae on 27 January 1971, entered an order dismissing the appeal and remanding the cause to the Juvenile Court of Mobile County for enforcement of its order or orders

At the hearing on the motion to dismiss, it was the contention of the counsel for the defendant LeFlore that the appeal had been filed on 2 July 1970, well within the ten day period under the provisions of Section 6, Act No. 295, approved 15 September 1961. (See **Acts of Alabama, Special Session, 1961,** p. 2353.) This Act now appears in the pocket part of 1958 Recomp. Code as Chapter 2A, Title 27, Sections 12(1)-12(9). Section 6 of the Act appears as Section 12(6), Title 27, and for convenience of the bar, the code sections wil hereafter be used as reference.

Section 12(6), Title 27, Code of Alabama 1940 (pocket part), pertaining to appeals to the Circuit Court from any final judgment of the court in which the paternity proceedings originated, provides that such appeal must be taken "within ten days **after rendition** thereof by filing written notice of such appeal within the said prescribe period **with the clerk of the circuit court to which said appeal was taken and in the court rendering the judgment."** (Emphasis ours.)

In support of his contention that the appeal from the judgment of the Juvenile Court was timely filed, counsel for appellant introduced two affidavits. One affidavit was excuted by his secretary of seven years. She set forth that her emyloyer had on 2 July 1970, dictated two notices of

appeal in the present case, one a notice of appeal to be filed in the Juvenile Court, and the second to be filed in the Circuit Court of Mobile County, and that a jury demand was made in each notice.

After typing the notices she asked the receptionist in the office to take the notices to the courthouse and told her to file one of the notices with the Juvenile Court, and one with the Circuit Court. When the receptionist return she stated she had filed the notices in the appropriate places.

The affidavit of the receptionist sets forth that on 2 July 1970, upon instructions. "I filed in the appropriate place in the Mobile County Courthouse, Notice of Appeals in case of: Cassie Belle Moore v. Walker B. LeFlore, Jr."

As before stated, neither of the notices of appeal are dated, and neither is marked filed. **Each apparently was in the Juvenile Court file** which was not received by the Circuit Court until 16 July 1970, more than ten days after the rendition of the judgment in the Juvenile Court.

An appeal is not a matter of vested right, but by the grace of statute, and must be perfected pursuant to the time and manner prescribed in the controlling statute, and if the requirements of such statute are not met, the appeal must be dismissed. **Liverpool & London & Globe Ins. Co. v Lowe**, 208 Ala. 12, 93 So. 765; **Lewis v. Martin,** 210 Ala. 401, 98 So. 635; **Sparks v. Brock & Blevins, Inc.,** 274 Ala. 147, 145 So. 2d 844.

We hold that on the facts and circumstances presented at the hearing on the motion to dismiss the appeal in the Circuit Court, we are in no position to say the Chancellor was not justified in the conclusions reached as evidenced by his decree as to this aspect of the evidence.

In brief and argument on appeal counsel for appellant contends that final judgment was not entered by the Juvenile Court until 14 July 1970, and therefore the appeal was in time even if the Juvenile Court file was not received in the Circuit Court until 16 July 1970. This contention was not made in the hearing before Judge McRae on the motion to dismiss, but is presented for the first time on appeal.

Counsel bases this argument on a document contained in the record, though it is not shown that said document was introduced at an exhibit, nor attached as an exhibit to any pleading.

This document first sets out in quotation marks the order and judgment of the Juvenile Court dated June 30, 1970, which order and judgment has hereinabove been set out in full, and will not here be set out again.

There appears below the quoted judgment, but not in quotation marks, the words, Dated, July 14, 1970.

Immediately below this appears a certificate naming Norman J. Gale, Supervisor, Non Support Department, Juvenile Court of Mobile County, Alabama, as the purported maker. The purported certificate certifies that "the foregoing is a true and correct copy of the Order and Judgment of the Juvenile Court of Mobile County, Alabama, rendered in the above case as the same remains of record in my office."

Below this again appears, also not in quotation marks, Dated, July 14, 1970.

This certificate is not signed by Gale. Even so, if as contended by appellant's counsel, this document must be deemed to show that the judgment in the Juvenile Court did not become final until 14 July 1970, is itself contradictory. The judgment set out in haec verba above the purported certificate bears the date June 30, 1970.

Though the order and judgment of the judge of the Juvenile Court was not signed by him, it was efficacious if responsive to the pleadings and duly filed and incorporated in the minutes of the Juvenile Court. **Taylor v. Hoffman,** 231 Ala. 39, 163 So. 339; Tilley, **Alabama Equity Pleading and Practice,** Section 166.

Under Section 12(6), Title 27, Code of Alabama 1940, (pocket part), the appeal from the judgment of the Juvenile Court would have to have been perfected within ten days from the rendition of the judgment. This was not done if the judgment was rendered on 30 June 1970.

There is a distinction between a "rendition" and an entry of a judgment. When a judgment is pronounced in open court, it is rendered, and the clerk can enter it in the minutes at any time during the session of the court. **Gorum v. Samuel,** 274 Ala. 690, 151 So. 2d 393. In the present case not only was the judgment pronounced in open court on June 1970, but it was also reduced to writing on that day and filed in the records of the Juvenile Court. It then became part of the public records of the Juvenile Court and afforded full notice to the parties. See **Mt. Vernon-Woodberry Mills v. Union Springs Guano Co.,** 229, Ala. 91, 155 So. 716. Indeed the appellant's appeal bond to the Circuit Court recites that the Juvenile Court did make and enter a final order of judgment on the 30th day of June 1930. Two notices of appeal specify that the appeal is from the judgment of the Juvenile Court on June 30, 1970, or from the decision of the Juvenile Court on June 30, 1970.

We do not see but that it must be concluded from these documents that the defendant regarded the judgment of the Juvenile Court of 30 June 1970, as final. Certainly, it cannot be reasonably argued that it was not rendered on 30 june 1970, and Section 12 (6), Title 27, Code of Alabama 1940 provides that an appeal must

be perfected in the manner provided within ten days of the **rendition** of judgment.

As against strangers the maxim that a court of record can act only through its records prevails, and the recording of the judgment in the minutes of the court may regarded as essential to its effectiveness as against third parties. **46 Am. Jur. 2d. Judgments,** Section 159. However, as between the parties, the validity of a judgment is not affected by the failure of the clerk of the court to note the judgment in the minutes book **Shargaa v. State** (Fla.), 102 So. 2d 809.

Clearly where, as here, a judgment has been pronounced in open court and a written judgment is on the day of pronouncement entered in the records of the court, all of which was know to the defendant, such defendant is in no position to contend the judgment was not final as to him.

Only two assignments of error have been argued on this appeal, namely assignments of error Nos. 5 and 6.

Assignment of error No. 5 is to the effect that the lower court erred in holding that the appeal to the Circuit Court was not timely filed.

Assignment of error No. 6 asserts that the lower court erred in dismissing the appeal from the Juvenile court.

These assignments are directed toward the same point or points, nd these we have reviewed. This has been a most tedious record to review. Included in it are several motions and orders pertaining to efforts to modify support payments made after the amount of such support payments were apparently fixed by the Juvenile Court. Also apparently, appeals were made as to these orders to the Circuit Court. We consider all these matters

immaterial to the points raised on this appeal by assignments of error Nos. 5 and 6.

The order of the court below of 27 January 1971, dismissing the abortive appeal to the Circuit Court, and which is the only order involved in this appeal, is due to be affirmed.

AFFIRMED.

Heflin, C. J., Lawson, Merrill and Maddox,, JJ., concur.

III. PEREMPTORY WHIT OF MANDAMUS

STATE OF ALABAMA -- JUDICIAL DEPARTMENT THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1971-72

Ex parte State of Alabama ex rel. Cassie Belle Moore (In re: Cassie Belle Moore

1 Div. 713

v.

Walker Beck LeFlore)

MADDOX, JUSTICE

This is a petition for mandamus against the Honorable James T. Strickland, as ex officio Judge of the Juvenile Division of the Circuit Court of Mobile County, seeking to compel Judge Strickland to issue execution on a judgment in a legitimation proceeding, wherein Walker Beck LeFlore was adjudged to be the father of two children born to Cassie Belle Moore. LeFlore was ordered to pay all medical expenses in connection with the birth of the children and $60 per week support, **plus arrange.**

This case originated by complaint of Cassie Belle Moore filed in the Juvenile Court of Mobile County, charging that LeFlore was the father of twin children born of Cassie Belle Moore.

The case came on for hearing before the Court, but upon motion, was dismissed because the original complaint was legally insufficient. A new complaint was filed and LeFlore filed responsive pleadings. Subsequently, LeFlore took the case to the Circuit Court of Mobile County on a petition for certiorari. The Circuit Court denied ceriorari and directed the Juvenile Court to continue with the paternity proceedings. By agreement, the same testimony taken in the first hearing (which was dismissed) was received in evidence. On June 30, 1970, the court found that LeFlore was the father of the twins. Oral notice of appeal was given by LeFlore and no specific amount of support was ordered pending the appeal. Written notice of appeal and a demand for jury trial was filed by LeFlore, but both notices of appeal were filed in the Juvenile Court. No written notice of appeal was filed in the Circuit Court, as required by law./1

The State, on the relation of Cassie Belle Moore, petitioned the Circuit Court of Mobile County, in July 1970, for mandamus, to order the Judge of the Juvenile Court to direct and require LeFlore to make periodic support payments for the children pending the appeal. The petition was ultimately granted. The State also filed a motion to dismiss the appeal to the Circuit Court on the grounds that it was not taken as prescribed by

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[1]/ In **LeFlore v. State, Ex rel. Cassie Belle Moore** 1 Div. 714 (MS), (decided April 6, 1972), this Court has held that the appeal was not taken in accordance with the provisions of the so-called deGraffenried Act, Act No. 295, Acts, 1961, p. 2353, carried in Title 27, § 12(1) - 12 (9, Code, 1940, Recompiled, 1958.

law in that no written notice of appeal was filed in the Circuit Court, as required by law.

On September 15, 1970, Judge Strickland, to whom the mandamus was issued out of the Circuit Court, ordered LeFlore to pay $60 per week into court for the support of the two chuldren, and to pay $609 in arrearage to bring the weekly payments up to date from July 14, 1970 through September 24, 1970.

On October 12, 1970, the State filed a motion in the Juvenile Court asking the court to issue execution on the judgment rendered by the Juvenile Court on June 30, 1970, as supplemented by the order of September 15, 1970, pursuant to the order of the Circuit Court on the mandamus petition.

The Juvenile Court denied the motion for execution without giving any reason for the denial on November 12, 1970.

The Circuit Court, on January 27, 1971, dismissed LeFlore's appeal is not timely filed.

On March 24, 1970 the Juvenile Court found LeFlore had never made a payment as ordered on June 30, 1970, and supplemented on September 15, 1970. The Juvenile Court found LeFlore had failed to pay $3,399.35, the accrued arrearages, and ordered him to pay by 5 o'clock p.m. of March 25, 1971 or be sentenced to hard labor in the Mobile County jail. The Juvenile Court set aside the March 24, 1971 order and passed the case pending a determination of an appeal to the court of Crim-

/2.Apparently, the Court was reffering to the appeal from the June 30, 1970 order of the Juvenile Court. In any event, this Court has affirmed the trial court's order of dismissal as being proper in **LeFlore v. State, Ex rel. Cassie Belle Moore,** 1 Div. 714 (MS), decided April 6, 1972).

inal Appeal of the order of the Circuit Court of March 24, 1971./3

Since no supersedeas bond was filed in connection with the appeal, this mandamus petition was filed to direct the Juvenile Court to execute upon the judgments. The State first filed a mandamus petition against Judge Strickland n the Circuit Court, but apparently since Judge Strickland is now a Circuit Judge and ex officio Judge of the Juvenile Court of Mobile County, the Circuit Court determined it was without jurisdictio nto supperintend a fellow Circuit Judge. See Act No. 1191, Acts of Alabama, 1969.

This petition for mandamus was then filed in the Court of Criminal Appeals which determined it was without jurisdiction and the nthe cause was transferred to the Court of Civil Appeals, which opined it was without jurisdiction and transferred the appeal to this Court. /4.

/3. The Circuit Court of Mobile County, on March 24, 1971, denied LeFore's motion for modification of the Circuit Court order of January 27, 1971. The appeal to the Court of Criminal Appeals was transferred to the Court of Civil Appeals, which transferred the appeal to this Court, and the judgment of the Circuit Court was affirmed. **LeFlore v. State, Ex rel. Cassie Belle Moore,** 1 Div. 714 (MS), (decided April 6, 1972). We do not decide whether the Court of Civil Appeals has jurisdiction, but since Section 7 of the deGraffenried Act (Title 27, § 12 (7), Code, 1940, Recomp., 1958) vests this Court with appellant jurisdiction, we assume such jurisdiction. Further legislation could clearify this problem.

/4. **Ex parte: State of Alabama, ex rel. Cassie Belle Moore (In re: Cassie Belle Moore v. Walker Beck LeFlore),** 1 Div 59, Court of Civil Appeals of Alabama, ——Ala. App.——.

The sole question presented by this petition is: Did the appeal to this Court supersede the judgment of the Juvenile Court of June 30, 1970, supplemented by judgments of September 15, 1970 and March 24, 1971, ordering LeFlore to make support payments for the children?

We think not. Section 4 of the deGraffenried Act (Title 27, § 12(4), Code, 1940, Recomp., 1958) provides that once a man is adjudged to be the father of a child, he is subject to all obligations for the care, maintenance, and education of such child.

LeFlore cites this Court's case of **Ex parte Newsome,** 212 Ala. 168, 102 So. 216 (1924), as authority for the proposition that a reputed father cannot be forced to make support payments to illegitimat child, pending appeal.

Newsome is easily distinguishable. As a matter of fact, **Newsome** inferentially says that under present law (Title 34, § 89, Code, 1940) the word "parent" means the father of a child or children, though born out of lawful wedlock. **Newsome** arose before the predecessor section of Title 34, § 89 (Section 4479 of the 1923 Code) went into effect. Furthermore, Section 4 of the deGraffenried Act is clear that once a man is adjudged to be the father of a child, he is subject to all obligations of the care, maintenance, and education of the child.

The judgment entered by the Juvenile Court was one for the payment of money and what was said inferentially in **Newsome** seems applicable here. The personwho has been adjudged the father of a child cannot deprive the child of his right to support merely by taking an appeal.

The common law rule that an appeal superseded a judgment in and of itself has been changed by statute to the extent that an appeal does not ordinarily super-

sede the judgment in the absence of a supersedeas bond. See § § 793, 794, 795, Title 7, Code, 1940. **Ex parte Dekle,** 278 Ala. 307, 178 So. 2d 85 (1965).

One of the purposes of the deGraffenried Act was to make provision for children born out of wedlock. Under separte provisions of law, the father of an illegitimate child can be compelled to support such child. **Franks v. State,** 26 Ala. App. 430, 161 So. 549 (1935). As a matter of fact, the only matter cognizable under the deGraffenried Act which becomes res judicata under Title 34, § 90, Code, 1940, is that of the paternity of the child. **Ward v. State,** 42 Ala. App. 529, 170 So. 2d 500 (1964); cert den., 277 Ala. 703, 170 So. 2d 504 (1965). We point this out to show that the Legislature did not intend to allow an appeal under the provisions of the deGraffenried Act to supersede the judgment unless a supersedeas bond was posted.

The State, in its sworn petition, avers that the children here involved are in dire circumstances and that LeFlore is a medical doctor and financially able to provide for their support. These allegations are not contradicted. Respondent's answer and return to the alternative writ of mandamus merely states that there has been no final judicial determination that LeFlore is the father of the children, and that the cause is now pending on appeal and that there are no provisions of law providing for support payments in a paternity proceeding pending appeal. We have already discussed each of these points raised by the respondent Judge.

Even if this Court was convinced that there was no statutory authority requiring the posting of a supersedeas bond if the judgment is to be superseded, this Court can, in limited cases, order the posting of a supersedeas bond. In **Piccolo v. Piccolo,** 251 Ala. 483, 38 So. 2d 12 (1948), this Court held that a supersedeas bond could be required by the Supreme Court in a **child custody** case, even in the absence of statutory authority,

ıder the provisions of Section 140 of the Alabama ɔnstitution of 1901. Therefore, in a proper case, and ɔt as a matter of right, we could order the posting · a supersedeas bond in this proceeding, even if we ould find that there was no specific statutory author-ɔ.

These two children were born on July 29, 1969. :Flore was adjudged to be their father on June 30, 70, and was ordered to make payments for their pport. He has paid nothing insofar as the record ows, and has posted no bond to supersere the judg-ent.

The State having shown a clear legal right to mpel the respondent to issue execution on the judg-ent, the peremptory writ of mandamus will issue as ayed for by petitioner.

WRIT OF MANDAMUS GRANTED.

Heflin, C. J., Lawson, Merrill and Harwood, J. J., ncur.

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Supreme Court, U. S.
FILED
OCT 19 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-335

WALKER BECK LeFLORE,

Petitioner,

versus

STATE OF ALABAMA, EX REL.
CASSIE BELLE MOORE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1972

No. 72-335

WALKER BECK LeFLORE,

Petitioner,

VS.

STATE OF ALABAMA, EX REL.
CASSIE BELLE MOORE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion (written by Justice Harwood) of the Alabama Supreme Court in LeFlore v. State of Alabama, ex rel. Cassie Belle Moore, which was docketed there as 1 Div. 714, is reported in 288 Ala. 310, 260 So.2d 581. It is also set forth in petitioner's Appendix B (II), beginning on page 14.

The opinion in the related case (written by Justice Maddox), bearing docket No. 1 Div. 713, in the Supreme Court of Alabama (Moore v. LeFlore), is reported in 288 Ala. _____,

260 So.2d 585. The latter is the mandamus case and the opinion is set forth in petitioner's Appendix B (III), beginning on page 22.

Both said opinions and judgments were rendered by the Supreme Court of Alabama on April 6, 1972.

Thereafter and on April 18, 1972, petitioner, Dr. Walker Beck LeFlore, filed a motion in the Juvenile Division of the Circuit Court of Mobile County, Alabama, for a new trial of the issue of paternity of the twin children born of Cassie Moore. The State of Alabama filed a motion to strike Dr. LeFlore's motion for new trial, and on May 17, 1972, Judge Strickland, Judge of the Juvenile Division of the Circuit Court of Mobile County, took the motion to strike and the motion for new trial under submission. On May 29, 1972, Judge Strickland denied the motion to strike and granted the motion for new trial. That order of May 29, 1972, is printed in Appendix A(I), infra, p. 18.

A petition for prohibition and mandamus was filed in the Supreme Court of Alabama by the State, the purpose of that petition being to require Judge Strickland to set aside the order granting the new trial. That case is docketed in the Supreme Court of Alabama as 1 Div. 741, and on June 29, 1972, the Supreme Court of Alabama issued the rule nisi ordering Judge Strickland to set aside the order of May 29, 1972, granting the new trial or appear within 30 days thereafter and show cause why he should not be required to do so. The order granting the rule nisi has not been officially reported, but it is printed in Appendix A (II), infra, p. 19.

Judge Strickland answered the rule nisi. Judge Strickland was represented by J. D. Quinlivan, Jr., Esquire, Mobile, Alabama, one of the attorneys who represented Dr. LeFlore in the other Alabama appellate courts in connection with this case. A copy of said answer is printed in Appendix A (III), infra. p. 21.

The Supreme Court of Alabama has not issued a final peremptory writ of prohibition or mandamus in case No. 1 Div. 741, and that case is still pending before the Supreme Court of Alabama.

JURISDICTION

The judgment of the Alabama Supreme Court in case Nos. 1 Div. 714 and 1 Div. 713 were both rendered on April 6, 1972. (The petition for certiorari seeks a review of the decision rendered in 1 Div. 714.)

On July 5, 1972, Mr. Justice Powell granted an application to extend the time for filing the petition for writ of certiorari until September 3, 1972. Within that time the petition was filed in this Court. However, there has been no final judgment rendered by the Supreme Court of Alabama either granting or denying the peremptory writ of prohibition or mandamus in case No. 1 Div. 741, and that case is still pending before the Supreme Court of Alabama. The latter case is closely connected with the judgment rendered on April 6, 1972, by the Supreme Court of Alabama in case No. 1 Div. 714. A denial by the Supreme Court of Alabama of the peremptory writ of prohibition and mandamus would make the matters involved in the present petition for certiorari moot.

The only time Dr. LeFlore raised a constitutional issue was at the hearing (R.p.135) before the Circuit Court of Mobile County which resulted in the judgment dismissing the appeal from the Juvenile Court (R.p.139; petitioner's Appendix B(I), p. 13).

As counsel for petitioner admits (Petition, p.7) no constitutional or federal issue was raised on the appeal to the Supreme Court of Alabama (or in connection with any of the appellate proceedings involving any of the cases, 1 Div. 713, 714 or 741).

QUESTIONS PRESENTED

1. Whether a putative father represented by counsel at all stages in a paternity case is denied rights protected by the Fourteenth Amendment when a court of competent jurisdiction, after hearing, adjudged him to be the father, and the State Supreme Court affirms the judgment of the Circuit Court, rendered after hearing, dismissing his attempted appeal, on the ground that he had failed to perfect the appeal in the time and manner provided by statute.

2. Whether the Supreme Court has jurisdiction to review a judgment of a state supreme court affirming a state circuit court judgment dismissing an appeal of a state juvenile court judgment establishing paternity where no Federal question was passed upon by the state circuit court and no Federal question was assigned as error or otherwise raised in or decided by the state supreme court.

3. Whether the Supreme Court will review such state court judgment, where, after rendition, but before the petition for certiorari was filed, the putative father on his motion

was granted a new trial by the state juvenile court, which, if upheld, would make the question raised by the petition moot, and the question whether such juvenile court had authority to grant a new trial was undecided and pending before the state supreme court when the petition for certiorari was filed.

STATEMENT OF THE CASE

In the first paragraph of petitioner's Statement of the Case (P.p.3) petitioner describes himself as a black physician.

At no point, in all the numerous proceedings below, was the race of any of the parties mentioned. There has never been any contention that there was any discrimination on account of race. Furthermore, Cassie Moore, the mother, and the twin children involved are also black.

We trust there will be no further reference to race, because race is not an issue.

Cassie Moore, a Mobile County, Alabama resident and a registered nurse at St. Martin de Porres Hospital, on August 21, 1969, made affidavit before one of the officers of the Juvenile Court of Mobile County (R.p.9) that illegitimate twin children, Collette and Claudia Moore, were born of her on July 29, 1968, and that petitioner, Dr. Walker Beck LeFlore, who practiced at the same hospital, was the father (R.pp.4-8).

The paternity proceeding came on for hearing before the Honorable James T. Strickland, Judge of the Juvenile Court of Mobile County. Both sides were represented by counsel throughout the proceedings (R.pp.14, 64). Testimony was begun on August 22, 1969

(R.p.13), resumed at an adjourned hearing, and concluded on June 30, 1970 (R.p.64). The testimony on the issue of paternity was taken before a court reporter, reduced to writing (R.pp.13,74) and filed in the Juvenile Court on July 16, 1970 (R.pp.7,106). The testimony covers 92 pages of the record (R. pp.14-106) which has been certified here at the request of petitioner.

The evidence adduced at the hearing showed that one of the children suffers from periodic convulsions and seizures; the other is a spastic with a microcephalic head, unable to walk, talk or crawl, having suffered permanent brain damage (R.pp.17,68-69,71). At that hearing Dr. LeFlore admitted having visited Cassie Moore at her apartment (R.p.100) and having had sexual intercourse with her for several months prior to the birth of the children (although he could not recall which months) (R.pp.91,92,94-95,103).

On June 30, 1970, at the conclusion of the hearing Judge Strickland adjudged Dr. LeFlore to be the father of the children (R.p. 8; P.p.15).

By certificate addressed to the Circuit Court of Mobile County, in Equity, Norman J. Gale, Clerk in the Juvenile Court of Mobile County, certified the correctness of the original Juvenile Court file (R.pp.1-2) and "all related documents pertaining to this cause". (R.p.2). Two notices of appeal, each signed by Dr. LeFlore's attorney, were included in the Juvenile Court file certified by Mr. Gale (R.pp.3,4).

Subsequently, the complete Juvenile Court file, including the two notices of appeal, was

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transferred from the Juvenile Court to the Circuit Court, and then became a part of the Circuit Court file (R.pp.127-128,133).

The statute pertaining to paternity proceedings in Alabama is Act No. 295, 1961 Acts of Alabama, and is codified in Title 27, §§12(1)-(9) of the 1940 Code of Alabama, as Recompiled in 1958 (Pocket Part). § 12(6) (P.Appendix, p.10) provides that the State or the reputed father may appeal from a final judgment rendered by the Juvenile Court by filing written notice of such appeal within 10 days after rendition of the judgment in both the Juvenile Court and the Circuit Court to which the appeal is taken. Appeals from the Juvenile Court of Mobile County lie to the Circuit Court of Mobile County, in Equity, Domestic Relations Division, by virtue of § 7, Act No. 374, 1965 Acts of Alabama.

On August 21, 1970, the State of Alabama filed in the Circuit Court, in Equity, a sworn motion to dismiss the appeal on the ground that the notice of appeal was not filed in the Circuit Court within 10 days after the rendition of the judgment of June 30, 1970 (R.pp. 108-111).

The issue before the Honorable Ferrill McRae (who at that time was the judge of the Domestic Relations Division of the Circuit Court of Mobile County, in Equity) on the motion to dismiss the appeal was whether the notice of appeal had been filed in the Circuit Court on July 2 or July 16 (R.pp.131-133,136).

At the hearing Judge McRae had before him and took judicial notice of the Circuit Court file, which contained the complete Juvenile Court file which had been transferred from the Juvenile Court to the Circuit Court

(R.p.131). The Juvenile Court file was shown by the Circuit Court records to have been received and filed in the Circuit Court on July 16, 1970 (R.pp.127-128), and Dr. LeFlore's counsel conceded the Circuit Court did not receive the Juvenile Court file until July 16 (R.p.133), more than 10 days after the Juvenile Court judgment was rendered (June 30) R.p.8).

In Alabama the Register in Equity is tantamount to the Clerk on the law side of the Circuit Court. By virtue of Title 13, §214, Code of Alabama of 1940, as Recompiled in 1958, the Register is under a duty to endorse all papers filed in any cause with the true date on which they were filed. There is a presumption (which is evidence in and of itself) that the Register has performed that duty.

The only date according to the Circuit Court records as to when the notice of appeal was filed in the Circuit Court is July 16, when the complete Juvenile Court file was received in the Circuit Court (R.pp.127-128).

The position of counsel for the State and Cassie Moore on that hearing was that, according to the court records, the notice of appeal was never filed by Dr. LeFlore, his counsel or any of their employees in the Circuit Court, but it only reached the Circuit Court on July 16 for the reason that it had been filed with the other notice of appeal in the Juvenile Court.

Dr. LeFlore's counsel contended that his receptionist had filed one of the notices in the Juvenile Court and one in the Circuit Court on July 2, but the only evidence to support that claim consisted of the affidavits of his secretary and receptionist (P.pp.11-12, 17-18).

Neither of the notices of appeal bears a filing date, except that the complete Juvenile Court file was marked received in the Circuit Court on July 16 (R.p.133). Dr. LeFlore's counsel also acknowledged that both notices of appeal were "folded thusly" (R.p.123) "right together in this file" (R.p.127).

The factual issue (whether the notice of appeal had been filed in the Circuit Court within 10 days from June 30) was decided by the Circuit Court without a jury.

The hearing before Judge McRae began on November 10, 1970 (R.p.120), was recessed and reconvened on December 1, 1970, at which time the case was taken under submission (R.p.139). The proceedings were taken down by a court reporter, transcribed and comprise 16 pages of the record (R.pp.121-137). Every facet of the case was discussed and, on the conflicting evidence presented, Judge McRae rendered the judgment on January 27, 1971, dismissing the appeal, holding that the appeal was not properly or timely filed (R.p.139; P.pp.13-14).

Dr. LeFlore, through his attorney, filed a motion to modify the judgment of January 27 (R.pp.141-142), then filed an amended motion to modify (R.pp.143-144), to which the State and Cassie Moore filed an answer (R.pp.146-148) Judge McRae on March 24, 1971, after considering the same, denied the motion to modify (R.p.149).

On April 6, 1972, the Alabama Supreme Court affirmed the Circuit Court judgment of January 27, 1971. Please see opinion of Supreme Court in 1 Div. 714 (P. Appendix, pp.14-22).

On appeal to the Alabama Supreme Court

only two assignments of error were argued and neither raised a Federal question. The only reference to any Federal question in any of the proceedings was made by Dr. LeFlore's counsel when the motion to dismiss the appeal was argued before Judge McRae (R.p.135). There was no ruling on that question and it was not again insisted upon. It was not assigned as error in, much less decided by, the Alabama Supreme Court whose judgment petitioner seeks to review.

Subsequently, but before the petition for certiorari was filed in this Court, Dr. LeFlore filed a motion for new trial to retry the issue of paternity in the Juvenile Court of Mobile County. The Juvenile Court granted the motion for new trial. The State of Alabama, on the relation of Cassie Moore, then filed a petition for writ of prohibition and mandamus in the Alabama Supreme Court (1 Div. 741), and that court issued the Rule Nisi, ordering Judge Strickland to show cause why he should not set aside the order granting the new trial. At the time the petition for certiorari was filed the question as to whether Judge Strickland had jurisdiction to grant a new trial was pending before and at this writing has not been decided by the Alabama Supreme Court. If the Alabama Supreme Court denies the peremptory writ, the matters sought to be reviewed here on the petition for certiorari would be moot.

ARGUMENT - REASONS WRIT SHOULD BE DENIED

At the outset it should be mentioned that paternity proceedings in Alabama are civil cases, not criminal cases, and are governed by the rules of civil procedure. Ward v. State, 42 Ala.App. 529, 170 So.2d 500; cert. den., 277 Ala. 703, 170 So.2d 504.

Petitioner contends he was denied his right to appeal from the judgment of the Juvenile Court of Mobile County in which he was adjudged to be the father of the children, because "court officials neglected to properly stamp said notices of appeal and process them by placing them in their respective files". (P.p.4). Our contention is that the Circuit Court of Mobile County, after full hearing, dismissed the attempted appeal, not because of some fault of the court officials, but because a notice of appeal was not filed in the Circuit Court within 10 days from the rendition of the Juvenile Court judgment.

The statute clearly provides that a notice of appeal must be filed in both the Juvenile Court and the Circuit Court within 10 days from the rendition of the judgment. At the hearing, the Circuit Court had before it the complete file. It showed that both notices of appeal were filed in the Juvenile Court (R.pp. 15-16) but that no notice was filed in the Circuit Court until the complete Juvenile Court file was sent over to the Circuit Court on July 16, 1970 (R.pp.2,3,4,127-128,133), which was more than 10 days after the judgment of June 30, 1970 (R.p.8; P.p.15).

The Register of the Circuit Court was under a duty to endorse the notice of appeal with the true date on which it was filed in the Circuit Court, and there is a presumption (which is evidence in itself) that the Register has performed that duty. Title 13, §214, Code of Alabama of 1940, as Recompiled in 1958; Gaines v. Harmon, 246 Ala. 307, 20 So.2d 503; Black v. Wilson, 281 Ala. 6, 198 So.2d 286. The trial judge noted that the only date appearing on the Circuit Court records as to the filing was July 16 (R.p.132). Entries on court records cannot be contradicted by parol evidence in

Alabama. Deslande and James v. Darrington's Heirs, 29 Ala. 92; Ex parte Lineville Nat. Bank, 217 Ala. 381, 116 So. 419.

The court also had before it the sworn motion to dismiss the appeal (R.pp.108-111) which stated:

> "* * * (N)o notice of appeal was filed in the Circuit Court of Mobile County, Alabama, until the complete Juvenile Court file was filed in the Circuit Court of Mobile County, Alabama, in Equity, Domestic Relations Division, with the Register of said Circuit Court, on July 16, 1970" (R.p.109).

The Circuit Court had ample evidence on which to base its judgment that the notice of appeal was not properly or timely filed (R.p.139).

The Supreme Court will not grant certiorari to review conflicting evidence or inferences drawn from it. General Talk. Pictures Corp. v. Western El. Co., 304 U.S. 175, 178, 82 L.Ed. 1273 (1938). Findings of the trial court, affirmed by the appellate court, based on conflicting evidence, will not be disturbed by the Supreme Court unless plainly without support. Alabama Power Co. v. Ickes, 302 U.S. 464, 477, 82 L.Ed. 374, 377, 58 S.Ct. 300 (1938).

In Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616, this Court defined "due process" and stated that alleged departures from the statute under which proceedings are held are not regulated or controlled by the Constitution of the United States.

During the course of the hearing before Judge McRae Dr. LeFlore's counsel remarked: "Now I might add this, that the issue is a constitutional issue because the Constitution of Alabama and the Constitution of the United States directly state that all persons are entitled to a trial by jury." (R.p.135).

However, paternity proceedings in Alabama are civil in nature and in Mobile County are tried on the equity side of the Court. A jury trial is authorized on the issue of paternity only on compliance with the statutory requirements. (Title 27, §12(6), Code of Alabama of 1940, as Recompiled in 1958 (Pocket Part); P.p.10)).

Moreover, no ruling on the point was urged of Judge McRae, and none was made. A federal question was not again referred to in the trial court, on the motion to modify, by assignment of error or in brief on appeal to the Alabama Supreme Court. The Alabama Supreme Court was not asked to decide a federal question, and that court consequently did not decide any federal question.

The federal question must not only have been presented to but must have been decided by the highest state court in order for the United States Supreme Court to review the judgment of the state court. Detroit City R. Co. v. Guthard, 114 U.S.133, 29 L.Ed. 118, 5 S.Ct. 811 (1885); Durley v. Mayo, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct.806 (1956); Cardinale v. Louisiana, 394 U.S.437, 22 L.Ed. 2d. 398, 89 S.Ct. 1162 (1969).

On appeal to the Alabama Supreme Court Dr. LeFlore's contention was that the judgment of the Juvenile Court establishing paternity did not become final until July 14, and since the

notice of appeal reached the Circuit Court on July 16, it was filed within the 10 day period. The Alabama Supreme Court rejected this argument and held that the judgment was rendered and became final on June 30, 1970, and the notice of appeal was not filed in the Circuit Court within 10 days thereafter (P.pp.18,19).

There was not any contention made on appeal to the Alabama Supreme Court that a court official had failed to mark the notices of appeal filed, as now contended on this petition for certiorari.

Rule 23(1)(f), Rules of Supreme Court, states that the petition for certiorari must specify the place and manner in which the federal question sought to be reviewed was raised in the court below, the method of raising it, and the way in which it was passed upon by the court.

The petition in this case simply asserts that, "The jurisdiction of this Court is based on 28 U.S.C. Sec. 1257(3), petitioners having alleged below, and alleged herein the denial of due process, deprivation of rights, and immunities secured by the Fourteenth Amendment to the Constitution of the United States." (P.p.2). The petition does not specify the place or manner of raising the question or where it was passed upon by the court.

In Congress of Industrial Organizations v. McAdory, 325 U.S.472, 89 L.Ed.1741 (1945), there was a petition for certiorari to the Alabama Supreme Court, urging a deprivation of federal rights. However, the question was not passed on by the Circuit Court (of Jefferson County, Alabama), was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on the question in

its opinion. The Supreme Court noted that the Alabama Supreme Court will not consider errors which have not been assigned. That is still the law in Alabama. Greer v. Eye Foundation, Inc. 286 Ala. 63, 237 So.2d 456 (1970), Appendix, Code of Alabama of 1940, as Recompiled in 1958 (1971 Pocket Part, p.273); Albright Equipment Company v. Waddell, 284 Ala. 329, 224 So.2d 878 (1969).

In Walters v. St. Louis, 347 U.S. 231, 98 L.Ed. 660 (1954), a federal question was raised in the lower court, but the state court had not passed on the question. The Supreme Court therefore declined to review the state court judgment. See also Nelson v. County of Los Angeles, 362 U.S. 1, 4 L.Ed.2d 494, 80 S. Ct. 527 (1960).

After the Alabama Supreme Court had affirmed the judgment of the Circuit Court dismissing the appeal Dr. LeFlore filed a motion in the Juvenile Court for a new trial to retry the issue of paternity. The Juvenile Court entered an order granting a new trial (R. Brief, Appendix, A(1), infra, p.18. The State then filed a petition for prohibition and mandamus in the Alabama Supreme Court where it was docketed as 1 Div. 741, and that Court issued a show cause order to Judge Strickland (R. Brief, Appendix, A(II), infra, p.19. Judge Strickland filed an answer (R.Brief, Appendix, A(III) infra, p. 21. At this writing the Alabama Supreme Court has not finally decided whether the Juvenile Court has jurisdiction to grant such new trial. The question is pending before the Alabama Supreme Court. If the Alabama Supreme Court denies the peremptory writ in 1 Div. 741, the question sought to be reviewed here would be moot.

The Supreme Court will not review a state

court judgment where, subsequent to the rendition of the judgment, events have changed which would make the question raised moot. Hall v. Beals, 396 U.S.45, 24 L.Ed.2d 214, 90 S.Ct.200 (1969). Please see also Rice v. Sioux City Cemetery, 349 U.S.70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

CONCLUSION

Respondent respectfully contends, therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel for Respondent:
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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing respondent's brief in opposition to petition for certiorari have been served on Charles S. Conley, Esquire, attorney for petitioner, at Executive House, 315 Bainbridge Street, Montgomery, Alabama 36104, by depositing the same in the United States Mail, at Mobile, Alabama, with first class postage prepaid, in an envelope addressed to him at his said post office address, this _____day of October, 1972.

_____

Of Counsel

APPENDIX

A(I). Juvenile Court Order Granting Motion for New Trial

CIRCUIT COURT, JUVENILE DIVISION IN AND FOR MOBILE COUNTY, ALABAMA

IN THE MATTER OF	*	
	*	
CASSIE BELL MOORE	*	
	*	
VS.	*	CASE NO. 13690
	*	
WALKER BECK LeFLORE	*	

ORDER AND JUDGMENT

DATE May 29, 1972

Complainant's motion to strike Defendant's motion for new trial taken under submission by Court on May 17, 1972, over the objection of the Complainant on the grounds that the Court had no jurisdiction to act on said motion for new trial. The Court grants a motion for new trial and denies the Complainant's motion to strike, and further orders that all payments as previously ordered in this Case for support will continue pending further order of Court. Case reset for hearing on August 1, 1972.

s/James T. Strickland
Judge, Circuit Court,
Juvenile Court Division

A(II). Order Granting Rule Nisi

THE STATE OF ALABAMA ----JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1971-72

1 Div. 741

EX PARTE: STATE OF ALABAMA, EX REL. CASSIE BELL MOORE

(Re: State of Alabama, ex rel. Cassie Bell Moore v. Walker Beck LeFlore)

PETITION FOR PROHIBITION AND MANDAMUS

Comes the petitioner, the State of Alabama, ex rel Cassie Bell Moore, by attorney and the petition for writ of prohibition, mandamus, or other appropriate remedial writ, to the Honorable James T. Strickland, as Judge of the Circuit Court of Mobile County, Alabama, Juvenile Court Division, being argued and submitted and duly examined and understood by the Court,

IT IS CONSIDERED that the petitioner is entitled to the issuance of the Rule Nisi.

IT IS, THEREFORE, ORDERED that the Rule Nisi issue forthwith to the Honorable James T. Strickland, as Judge of the Circuit Court of Mobile County, Alabama, Juvenile Court Division, commanding and directing him to do the following in the matter of Cassie Bell Moore v. Walker Beck LeFlore, Case No. 13690, in the Circuit Court, Juvenile Division, in and for Mobile County, Alabama:

1. To set aside the order of May 17, 1972, taking the motion for new trial under

submission;

2. To set aside the order of May 29, 1972, granting the defendant, Walker Beck LeFlore, a new trial; and

3. To set aside the order of May 29, 1972, denying petitioner's motion to strike said motion for new trial;

and to enter an order granting the petitioner's motion to strike the motion of the defendant, Walker B. LeFlore, for a new trial from the records of said Court, or to appear before this Honorable Court within 30 days from the date of the writ and show cause why he should not be required to do so.

III. Judge Strickland's Answer to Rule Nisi

Ex parte STATE OF ALABAMA, ex rel. CASSIE BELL MOORE,	*	
Petitioner,	*	
VS.	*	IN THE SUPREME
THE HONORABLE JAMES T. STRICKLAND, as Judge of the Circuit Court of Mobile County, Alabama, and as ex officio Judge of the Juvenile Division of the Circuit Court of Mobile County, Alabama,	*	COURT OF ALABAMA.
	*	1 Div. No. 741
Respondent.	*	
In re: State of Alabama, ex rel. Cassie Bell Moore,	*	
Complainant,	*	
VS.	*	
Walker Beck LeFlore,	*	
Defendant.	*	
(Cassie Bell Moore, Complainant, Vs: Walker Beck LeFlore, Defendant, In the Juvenile Division of the Circuit Court of Mobile County, Alabama, Case No. 13690, formerly Case No. 13578)	*	

PETITION FOR PROHIBITION AND MANDAMUS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Comes now the Respondent, James T. Strickland, and for answer to the petition sets down and assigns the following, separately and severally:

1. That the action of the Respondent in granting the motion for new trial was not an improper exercise of judicial authority.

2. That the provisions of Tit. 27, Sec. 12(4), Code of Alabama of 1940, (As Last Amended), provides that the Court may at anytime subsequent to the rendition of the original order or judgment modify or vacate any such order or judgment in proceedings brought under this chapter on written petition duly filed by either party to the original complaint, which petition shall set out in reasonable detail the facts and circumstances allegedly warranting such modification or vacation.

3. The action of Respondent in granting the motion for new trial is consistent with Titl. 27 Sec. 12(4), Code of Alabama of 1940, (As Last Amended).

4. That Tit. 27 Sec. 12(4), Code of Alabama of 1940, (As Last Amended, provides that modification or vacation of the original judgment shall be permitted on a showing of substantially changed conditions subsequent to rendition of the original judgment.

Respectfully submitted,

S/ J. D. Quinlivan, Jr.
J. D. QUINLIVAN, JR.,
Attorney for Respondent